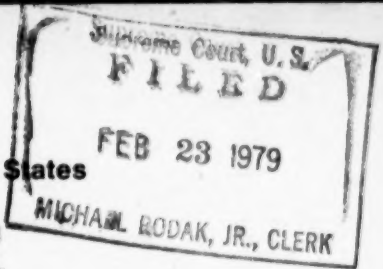


IN THE
Supreme Court of the United States
OCTOBER TERM, 1978



No. 78-1163

OHIO EDISON COMPANY,

Petitioner,

v.

NED E. WILLIAMS (succeeded
by James F. McAvoy), DIRECTOR
OF ENVIRONMENTAL PROTECTION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF OHIO

WILLIAM J. BROWN
Attorney General of Ohio,

DAVID E. NORTHROP
Assistant Attorney General

*Environmental Law Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766*

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

1. Nature of the Case

This matter arose upon application by Petitioner Ohio Edison Company for variances from air pollution abatement requirements imposed by regulations of the Ohio Environmental Protection Agency. Ohio Edison appeals from the order of Respondent Director of Environmental Protection denying the applications, and refusing to permit the administrative evidentiary hearing, held to grant Ohio Edison the opportunity to demonstrate its eligibility for variances under applicable regulations, to be converted into a forum for a broad-based challenge to air contaminant emission standards. Ohio Edison now claims that the Director's refusal to ignore or invalidate his regulations in a quasi-judicial context is a violation of the Due Process Clause of the Fourteenth Amendment.

2. Course of Proceeding

In February, 1972, the Air Pollution Control Board promulgated regulations to remedy the pervasive problem of poor air quality in Ohio. The regulations resulted from amendment, in 1971, of Chapter 3704, Revised Code, in which the Ohio General Assembly granted the Board the authority necessary so that Ohio would "comply with the 1970 amendments of the Federal Clean Air Act," uncodified Section 4, Amended Substitute Senate Bill No. 370, 134 Laws of Ohio, page 650. The regulations established ambient air quality standards (prescribing concentrations of pollutants in the outdoor air necessary to protect public health and welfare), emission standards (applicable to each source of air contaminants), and regulations governing the issuance of permits and variances. The latter regulation unambiguously limited issuance of variances — which authorize emissions in excess of applicable emission standards — to contaminant sources which would commit to an abatement program resulting in compliance with emission standards, and prescribed dates beyond which variances would no longer issue. The regulations are now administered by the Director of Environmental Protection, and are substantially unchanged from their original promulgation over seven years ago. The variance regulation, now numbered OAC 3745-35-03 (Appendix L, p. 156a, Petition for Writ of Certiorari), has been amended to extend the deadline dates, but has never been altered so as to delete the requirements of ultimate compliance with emission standards (OAC 3745-35-03(F) (1)), and the preclusion of issuance of variances beyond a specified date (OAC 3745-35-03(F) (2)).

Ohio Edison, in August of 1972, applied for variances for air contaminant sources at twelve facilities within the State of Ohio. The applications did not, despite the clear provisions of OAC 3745-35-03, commit Ohio Edison to timely compliance with emission standards, but rather sought to challenge the air pollution regulatory code as unlawful and therefore inapplicable to Ohio Edison. The Director was requested, in effect, to respond to Ohio Edison's applications by declaring his own regulations unlawful and granting to Ohio Edison a new, lenient emission standard in an administrative order to be denominated a "variance."

The Director declined Ohio Edison's request to ignore his own regulations, but rather, in May, 1973, issued proposed variances to Ohio Edison which, as required by OAC 3745-35-03,

contained schedules by which applicable emission standards were to be attained. Ohio Edison, in June, 1973, requested adjudication hearings, thereby preventing the proposed variances from becoming final until completion of hearing proceedings. At hearing, Ohio Edison did not attempt to demonstrate its eligibility for variances under OAC 3745-35-03, but rather adduced evidence upon which the Director was requested to rule that OAC 3745-17-10, OAC 3745-17-13, and OAC 3745-35-03, in spite of their clear applicability to Ohio Edison, were to be shunted aside and variances issued containing more lenient terms acceptable to Ohio Edison. Thus, Ohio Edison persisted in its quest for a rewriting of the air pollution regulatory code.

On December 12, 1974, the Director issued his decision (Appendix G, p. 27a, Petition for Writ of Certiorari). Because he was now convinced that his sulfur dioxide emission standard regulation, OAC 3745-17-13, was more stringent than necessary to achieve the purposes of Chapter 3704, Revised Code, the Director appropriately declined to issue the variances sought by Ohio Edison, for, as required by OAC 3745-35-03(F) (1), such variances would necessarily contain a schedule within which Ohio Edison would be required to comply with such emission standard. As to emissions of particulate matter, however, the Director found no reason to further delay compliance with the emission standard regulation. He therefore issued an enforcement order pursuant to Section 3704.03(S), Revised Code, requiring that Ohio Edison's facilities comply with the particulate matter emission standard, either through installation of abatement equipment or phase out of the facility, by April 15, 1977, the date prescribed by OAC 3745-17-04 upon which the ambient air quality standards were to be attained. The Director again explicitly declined to rewrite his regulations, stating, at page 16 of his opinion (Appendix G, p. 40a, Petition for Writ of Certiorari):

The Director is bound by law and his own regulations to base his final decision in any adjudication hearing solely on the evidence presented in the record. When deciding the outcome of an adjudication hearing, the Director can not act in a legislative (rulemaking) capacity. He must act as judge.

And, at page 20 (p. 44a, Petition for Writ of Certiorari):

The Director is not at liberty to address the general validity of his own regulations in the context of this final findings and order. Regulations may be amended or rescinded only through the procedures established in Section 119.03 of the Ohio Revised Code.

Therefore, the quasi-judicial rulemaking sought by Ohio Edison was not forthcoming from the Director.

In January, 1975, Ohio Edison and other utility companies subject to the Director's decision and orders appealed to the Environmental Board of Review. The Board separated the utilities for purposes of deciding the appeals, and decided the appeal of the Cleveland Electric Illuminating Co. first, in October of 1976. Cleveland Electric's appeal reached this Court through filing of a Petition for Writ of Certiorari on July 27, 1978 (No. 78-152). The Petition, which presented, *inter alia*, the identical issue presented by the instant Petition, was denied on October 2, 1978.

The Board rendered its decision regarding Ohio Edison's appeal on May 20, 1977. As with the Cleveland Electric appeal, the Board affirmed the Director's refusal to engage in *de facto* rulemaking in the context of a quasi-judicial administrative hearing. The Board further affirmed the Director's order insofar as it required Ohio Edison to comply with Ohio EPA's particulate matter emission standard, but extended the time for such compliance by requiring the Director to issue variances beyond the dates provided by OAC 3745-35-03(F) (2) beyond which variances may not issue.

Both the Director and Ohio Edison appealed to the Court of Appeals for Franklin County, Ohio. The Director argued, and the court held (Appendix D, p. 7a, Petition for Writ of Certiorari), that the deadline dates and other provisions of OAC 3745-35-03 are lawful as a matter of Ohio law, and therefore reversed the Board insofar as the Board ordered issuance of variances beyond such dates. The court affirmed the Director and the Board in holding that a quasi-judicial administrative hearing presented Ohio Edison the opportunity to demonstrate its eligibility for variances under the regulatory code, but did not constitute a forum in which Ohio Edison could mount a broad-based attack upon air pollution regulations. The court held that such an attack could be made in defense to an action brought by the Director to

enforce the regulations. Because Ohio Edison was clearly ineligible for variances under the OAC 3745-35-03, the court declined to address Ohio Edison's other assignments of error, the disposition of which would not affect the judgment of the court or proceedings on remand.

Upon appeal, the Supreme Court of Ohio refused jurisdiction, noting "that no substantial constitutional question exists herein." (Appendix A, p. 1a, Petition for Writ of Certiorari).

Ohio Edison, on January 25, 1979, filed its Petition for Writ of Certiorari.

QUESTION PRESENTED

Does the Due Process Clause require the Ohio Director of Environmental Protection, in an administrative hearing requested by an applicant for a variance from air pollution abatement requirements, to give cognizance to such applicant's broad-based challenge to such requirements, when to do so would offend settled notions of Ohio administrative law, and any variance issuing as a result of such challenge would contravene the clear terms of the lawful regulation governing issuance of such variances?

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The Question Presented Here Is Identical To That Presented By Petitioner Cleveland Electric Illuminating Company In No. 78-152, Which Petition Was Denied By This Court On October 2, 1978.

This petition is the companion of an earlier petition of the Cleveland Electric Illuminating Co. in No. 78-152. The December 12, 1974, decision of Respondent Director was issued at the close of a consolidated proceeding in which both Cleveland Electric and Ohio Edison participated as parties, and from which both appealed. The Environmental Board of Review decided Cleveland Electric's appeal approximately seven months prior to deciding the Ohio Edison appeal, even although both appeals presented virtually identical issues of law. Conse-

quently, the decisions of the Ohio appellate courts, and the petitions for writ of certiorari, are separated by several months.

In every tribunal, both Cleveland Electric and Ohio Edison have argued that they should be permitted to attack applicable regulations rather than adduce evidence to demonstrate eligibility for variances under OAC 3745-35-03. Both petitions for writ of certiorari contend that the Due Process Clause requires the Director to grant the requested relief, i.e., that the narrowly-defined administrative hearing below be distorted into a virtually boundless proceeding in which nearly every air pollution issue may be litigated, see Petition for Writ of Certiorari, No. 78-152, at pages 16 through 18.

There is nothing to distinguish this petition from that in No. 78-152. Accordingly, this petition should be denied for the same reasons which support denial of the earlier petition.

2. The Due Process Clause Does Not Require That A State Provide A Forum Within Which An Air Polluter May Mount A Pre-enforcement Challenge To Emission Standard Regulations.

The contention of Ohio Edison is two-fold: a.) that the Due Process Clause requires a state to provide a forum for a pre-enforcement challenge to emission standards; and b.) that the Due Process Clause required Respondent Director to convert the administrative hearing below into such a forum, despite contrary provisions in a regulation held lawful under state law. Both contentions lack merit.

There is no dispute between the parties that the Due Process Clause requires a state to provide an opportunity to a regulatee to mount a defense to regulatory requirements "at a meaningful time and in a meaningful manner," *Fuentes v. Shevin*, 407 U.S. 67, at 80 (1972). Rather, the parties dispute whether Ohio Edison had available to it a pre-enforcement remedy that it chose not to employ, and, if not, whether its conceded opportunity to challenge regulations as a defense to an enforcement action (unless waived or barred by *res judicata* or other such doctrine) constitutes a meaningful opportunity to be heard.

Assuming, *arguendo*, that Ohio Edison may only challenge applicable emission standards as a defense to an enforcement action, Ohio Edison has not demonstrated that such offends the Due Process Clause. Ohio Edison relies exclusively on *Ex parte Young*, 209 U.S. 123 (1908). There, the Court, in an extremely narrow holding, ruled that the Due Process Clause prevents a state from establishing mandatory rates for a railroad, and, in the absence of a pre-enforcement remedy, providing such harsh penalties for violating such rate requirements that the railroad will not risk non-compliance so as to challenge the rates in the resultant enforcement action. The Court concluded that such a scheme wholly deprived the regulatee of a meaningful opportunity to challenge the rates.

Young does not govern here for two reasons. First, as discussed more fully below, Ohio Edison had available to it a pre-enforcement remedy it chose not to employ. Second, *Young* rests upon the fact that the penalties for non-compliance were so extreme that the railway chose to comply rather than risk enforcement. In the present case, as is clear from the Petition for Writ of Certiorari, Ohio Edison has chosen not to comply, but rather to persist in an ill-chosen course of administrative litigation. Clearly, therefore, the risks of being subjected to penalties in enforcement did not coerce Ohio Edison into compliance, as had occurred in *Young*. Therefore, a requisite of the holding and discussion in *Young* is lacking, rendering the case distinguishable from the case at bar.

Moreover, the Court indicated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), that the constitution does not require provision of a pre-enforcement remedy against administrative regulations. The Court concluded, on the basis of statutory provisions, that a pre-enforcement remedy existed against the regulations there at issue. The Court noted, however, that had the intent of Congress been to the contrary, the Court would be bound thereby, thus necessarily concluding that Congress is under no constitutional mandate to provide the pre-enforcement remedy. Such is apparent from the passage set forth at page 153:

Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, ac-

cess to the courts under the Administrative Procedure Act and Declaratory Judgment Act must be permitted, *absent a statutory bar* or some other unusual circumstance, neither of which appears here. (Emphasis added).

Because Congress may impose "a statutory bar" to availability of a pre-enforcement remedy, such a remedy cannot be required by the Due Process Clause.

Therefore, Ohio Edison's invitation to the Court to expand the Due Process Clause well beyond its recognized scope should be declined.

3. Ohio Edison Had Available To It A Pre-enforcement Remedy It Chose Not To Employ.

The holding in *Young* is premised on the conclusion that the railway did not have available to it a pre-enforcement remedy against the prescribed rates, and that the enforcement defense remedy was effectively foreclosed. By contrast, Ohio Edison had a pre-enforcement remedy.

The emission standards of which Ohio Edison complains were effectuated by the now defunct Air Pollution Control Board in February of 1972. No exclusive statutory scheme had been established for review of such regulations, and Ohio Edison therefore had available to it an action in declaratory judgment to challenge the lawfulness of the emission standards, *Burger Brewing Co. v. Liquor Control Commission*, 34 Ohio St.2d 93 (1973). It was not until October of 1972 that the General Assembly extinguished the availability of declaratory judgment by creation of the Environmental Protection Agency subject to exclusive review in the Environmental Board of Review, *State ex rel. Williams v. Bozarth*, 55 Ohio St.2d 34 (1978). Therefore, for over eight months, Ohio Edison sat on a pre-enforcement remedy against emission standards. Ohio Edison, however, made the deliberate choice to attempt to convert the licensing proceeding for a variance into a forum for its broad-based challenge to the emission standards. As the court ruled below, the variance proceeding may not be converted into such an *ad hoc* rulemaking proceeding. Therefore, Ohio Edison simply erred in picking the wrong remedy, and should not now rely on the Due Process Clause to rectify its error.

The availability of the pre-enforcement remedy renders *Young* inapposite. In both *Wadley Southern Railway Company v. Georgia*, 235 U.S. 641 (1915), and *St. Louis, Iron Mountain and Southern Railway Company v. Williams*, 251 U.S. 63 (1919), the Court refused to apply the doctrine of *Young* on the ground that the railways had had an opportunity to challenge the rates in a forum other than in defense to enforcement. The Court's final paragraph in *Wadley* is pertinent here, 235 U.S. at 699:

But where, as here, after reasonable notice of the making of the order, *the carrier failed to resort to the safe adequate, and available remedy by which it could contest in the courts its validity*, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful. (Emphasis added).

Ohio Edison, having chosen to forego declaratory judgment, should be left to its defenses in enforcement, and should not be permitted, on spurious due process grounds, to stretch its licensing proceeding well beyond its appropriate scope.

4. Even If Correct, Ohio Edison's Due Process Analysis Is Not Necessarily Applicable To The Administrative Proceeding Here At Issue.

Ohio Edison's contention that the Due Process Clause requires provision of a pre-enforcement remedy, even if correct, does not compel the conclusion that the licensing proceeding below must constitute that remedy. Surely, it is the state which must determine how to provide such a remedy, either by declaratory judgment, administrative proceeding, or otherwise. But Ohio Edison argues that it is *this* licensing proceeding which *must* be regarded as the due process hearing in which to challenge emission standards. Surely, the Due Process Clause is not so specific as to require the state to endorse a regulatee's choice of the forum such regulatee chooses to employ in mounting its challenge to regulatory requirements.

Therefore, because Ohio's purported duty to provide to Ohio Edison a pre-enforcement remedy may exist independently from the administrative proceeding below, review and remand are inappropriate.

5. The Alleged Error Did Not Alter The Result, And Is Therefore Not Prejudicial.

Lastly, even if the Director erred in not permitting the challenge to emission standards, such error was not prejudicial, and therefore should not be the subject of appellate review. The proceeding arose upon applications for variances, which are governed by OAC 3745-35-03. Subsection (F) (2) of that regulation flatly forbids issuance of variances after specified and now expired deadline dates. The deadline dates have been upheld as authorized by and consistent with Ohio law, *Cleveland Electric Illuminating Co. v. Williams*, 55 Ohio App.2d 272 (Franklin County, 1977). Therefore, Ohio Edison's challenge to emission standards, even if successful, would not have served as a basis upon which variances could issue.

In this sense, therefore, Ohio Edison seeks a forum in which the Director is to issue an advisory opinion regarding his emission standards. Such, surely, is not mandated by any accepted notion of due process.

CONCLUSION

Ohio Edison has not demonstrated that the denial of variances in accordance with a lawful state regulation has offended the Due Process Clause. Accordingly, Ohio Edison has not presented a case to this Court in which "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court," U.S. Sup. Ct. Rule 19(1) (a). Therefore, a writ of certiorari should not issue.

Respectfully submitted,

WILLIAM J. BROWN
ATTORNEY GENERAL OF OHIO

DAVID E. NORTHROP
Assistant Attorney General
Environmental Law Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Attorney for Respondent